principal; and the agent can do no act in the name of the principal which the principal might not himself do, if he were personally present. The principal is present by his representative. * * * * But it would be preposterous, where the power is in its nature revocable, to hold that the principal was, in contemplation of law, present, making a contract, or acknowledging a deed, when he was in fact lying insensible upon his death bed, and this fact well known to those who undertook to act with and for him. The act done by the agent, under a revocable power, implies the existence of volition on the part of the principal. He makes the contract—he does the act. It is done through the more active instrumentality of another, but the latter represents his person and uses his name." How much more preposterous is it to conceive of a man's committing a tort when he is in his grave?

In *Moore* v. *Weston*, 13 N. D. 574, 102 N. W. 163, the court expressly held that an attempt to create an agency to become effective at the death of the principal is nugatory. In that case there was a memorandum upon the back of a note which provided that if it were not paid before the payee's death, the maker should expend the balance due, for funeral expenses and monument for the payee. It was held that the maker was the agent of the payee to carry out the provisions of the memorandum after his death, but that the agency never became operative as *the death terminated the authority which purported to create it.*

The executor is not an agent of the testator. He is a principal himself. He is part of an instrumentality which the law has provided to carry out the testator's will. It cannot be denied that the injury done to the plaintiff by the publication of the libel was one for which ample damages were justly due. As the court said, the libel will be republished and the plaintiff's character maligned every time the title to any land devised in the will is examined upon the records. And from one point of view the attempt by the court to adopt a seemingly tenable theory which, although it overthrew settled principles of law, would do justice to this particular case, is commendable. But the making of law is for legislative bodies, and any attempts by a court to usurp that function by distorting well-founded principles is inconsistent with our departmental form of government. W. F. S.

THE RULE OF HIGHER INTERMEDIATE VALUE.—What is the measure of damages, upon the conversion of, or breach of contract to deliver, goods of a fluctuating value? This was the interesting and by means settled question involved in the recent case of *Brewer et al.* v. *Neatherly et al.*, 162 S. W. 1185 (Texas), where the defendant contracted to deliver on or before November 20, 1912, two hundred bales of cotton at 10¾ cents per lb. On November 8, defendant gave plaintiff notice that he would not perform the contract; on that day cotton was worth 11⅞ cents, on November 12, it was worth 12 1-6 cents, and still increasing in price and had been so increasing since October 28th. No evidence was given as to the value on November 20, the agreed date of delivery, or as to the value at the time of trial. Plaintiff contended that he was entitled to the difference between the contract price and the value of cot-

ton on November 20, the agreed date of delivery. Defendant contended the damages should be the difference between the contract price and the value at the date of breach. The court held contrary to the contentions of both, that November 12 should be taken as the date for computing the damages, but did not undertake to state the rule of law involved. The earlier cases in England left the law in an unsettled state and it still seems to be undetermined. A leading case *Sheperd* v. *Johnson,* 2 East 211, was on a writ of inquiry to assess damages on a bond given by defendant, conditioned to replace on August 1, 1799, a quantity of stock lent him. The question was whether the damages should be calculated as of August 1, or as of the date of trial. It was held that the value at the date of trial was the true rule, and LAWRENCE J., in support of this view contended that if a bill in equity had been filed for specific performance, the court would compel a restoration as of that date, consequently the defendant cannot complain if he is compelled to pay that sum as damages. But in a later case in the Court of Exchequer, *Startup* v. *Cortazzi,* 2 C. M. & R. 165, Lord ABINGER refused to apply this rule to the sale of linseed, saying however that it might be applicable to stocks. This rule was then followed in *Owen* v. *Routh,* 14 C. B. 327 and *McArthur* v. *Seaforth,* 2 Taunt, 257. It seems therefore, that in England the courts apply the extreme rule in the case of failure to deliver stocks and give the value as of date of trial, while in the case of conversion of other chattels they go to the other extreme and arbitrarily take the date of conversion, while in cases of failure to deliver on a contract, it is left open and depends on the terms of the contract and the surrounding circumstances. The rule of higher intermediate value is not applied.

The leading case on the rule of higher intermediate value in the United States is *Romaine* v. *Van Allen,* 26 N. Y. 309, in which case the court tried to strike an equitable medium between the two extremes laid down by the English courts, and thereby actually compensate the plaintiff for his loss rather than to choose an arbitrary date. As a result of this attempt we had substantially the first so called rule of "higher intermediate value," which however was modified as shown below. In *Romaine* v. *Van Allen* the action was for the wrongful conversion of railway shares pledged with the defendant as collateral security for a loan. The court allowed "the highest value at any time" between conversion and date of trial. The court did not restrict the application of the rule to stocks, for as Justice ROSEKRANS said: "Although the general rule of damages in trover may be the value of the chattel at the time of its conversion, with interest, or that value when the chattel has a determinate or fixed value, yet when there is any uncertainty or fluctuation attending the value, and the chattel afterwards rises in value, the plaintiff can only be indemnified by giving him the price of it at some period subsequent to the conversion; * * * * * that in such cases plaintiff is entitled to recover the market value of the property at any time intermediate the conversion and the trial." This decision was followed and reaffirmed in *Burt* v. *Dutcher,* 34 N. Y. 493, which was an action for conversion of merchandise and not of stocks. It was again affirmed in *Markham* v. *Javdon,* 41 N. Y. 235, GROVER and WOODRUFF, JJ., dissenting.

The rule as laid down in *Romaine* v. *Van Allen* was permanently modified by the case of *Baker* v. *Drake*, 53 N. Y. 211, 217, 13 Am. Rep. 507, wherein the rule was restricted to the market value within a resonable time, after plaintiff received notice of the conversion. This modification was approved and affirmed in *Wright* v. *Bank of Metropolis*, 110 N.Y. 237, 6 Am. St. Rep. 356,, 1 L. R. A. 289. We then have from the foregoing cases in New York the so called "higher intermediate value" rule as stated at the present time: "In actions for the conversion of stocks, the measure of damages is the highest market value between the time of injury and the time when the plaintiff might with due diligence have replaced himself in the market." This rule applies to dealings in contracts for the failure to deliver chattels of a fluctuating value, viz, "cotton futures," *Hurt v. Miller*, 105 N. Y. Supp. 775.

The Supreme Court of the United States has adopted the New York rule as applied to stock transactions, but refused to extend it to other chattels. *Galigher* v. *Jones*, 129 U.S. 193, 9 Sup. Ct. 335, BRADLEY J. saying "Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time, and hence with regard to them the ordinary measure of damages is their value at the time of conversion, or in case of sale and purchase, at the time fixed for their delivery."

Texas, the state where the principal case was decided, seems to apply the rule as first laid down in New York in *Romaine* v. *Van Allen*, and without the limitation of *Baker* v. *Drake;* the Texas rule may be stated as follows, "Plaintiff is entitled to the highest intermediate value between the date of the injury and the time of trial, subject however, to the limitation that the plaintiff must bring his action seasonably, otherwise the plaintiff is restricted to the value at the time of injury. *Heilbroner* v. *Douglass*, 45 Tex. 402.

Mr. SEDGWICK, in his work on DAMAGES, gives his views of the rule as follows: "In most jurisdictions the rule is not recognized. Its existence can perhaps best be explained by saying that in its present form the rule of higher intermediate value represents the efforts of the courts in the direction of minimizing the effects of what was once a rule still more opposed to principle."

C. W.